Ryan Iron Works, Inc. *and* Shopmen's Local 501, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO *and* National Shopmen Pension Fund, Trustees Toney, Kerr, Szabrak, Cragle, Thomas, Kaine. Cases 1–CA–33353, 1–CA–33762, 1–CA–34066, and 1–CA–33956

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On October 27 1996, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the National Shopmen Pension Fund each filed an answer, and the Respondent filed a reply to these answers. The General Counsel and the National Shopmen Pension Fund also each filed exceptions and a supporting brief, the Respondent filed an answer to these exceptions, and the National Shopmen Pension Fund filed a reply to the Respondent's answer. In addition, the AFL–CIO filed a brief as amicus curiae in support of the exceptions filed by the General Counsel and the National Shopmen Pension Fund, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified here, and to adopt the recommended Order, as modified and set forth in full below.

The unfair labor practice issues in this case arise in the context of the parties' unsuccessful negotiations for a collective-bargaining agreement to succeed the contract that expired on September 10, 1995.[3] The Union and unit employees struck the Respondent on September 11. The Respondent began hiring replacements in October, although it hired most replacements in November. According to the parties' stipulation, the Respondent implemented the terms of its October 2 bargaining proposal "when crossover employees began abandoning the strike and returning to work on November 6."

On December 6, the Respondent received an employee petition, signed by approximately 55 employees who had either crossed the picket line to return to work or who had been hired as replacements, stating that they did not wish to be represented by the Union. On December 7, the Respondent withdrew recognition from the Union based on the petition. On December 8, the Union unconditionally offered for all remaining strikers to return to work on December 11. On that date, the Respondent declined to reinstate returning strikers, stating that there were no jobs available. Subsequently, the Respondent offered reinstatement to all but 12 strikers.

1. We affirm the judge's finding that the Respondent violated Section 8(a)(5) of the Act by making unilateral changes based on its October 2 proposal in unit employees' wages, benefits, and working conditions before the parties had reached impasse in their contract negotiations.[4] (As mentioned, the parties stipulated that these changes were initiated on November 6.) We do not, however, find that the Respondent acted unlawfully with respect to the implementation of any different terms of employment for striker replacements. For the reasons set forth in *Detroit Newspapers*, 327 NLRB 871 (1999), and precedent cited there, struck employers have no statutory obligation to bargain about employment terms for replacements during a strike.[5]

2. The judge further found that the Respondent violated 8(a)(5) by unilaterally ceasing pension payments on behalf of the unit employees as of November 10, when the Respondent failed to make its monthly payment into the National Shopmen Pension Fund on behalf of replacement employees who performed bargaining unit work during the month of October. As stated in the pre-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We affirm the judge's conclusion, for the reasons set forth in his decision, that the Respondent did not engage in overall bad faith bargaining. We also affirm the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) by introducing a more regressive subcontracting proposal during the parties' negotiations. Although, we do not agree with the judge that the proposal "does not seem much of a change" from the subcontracting provision in the parties' expired contract, we do agree with him that the Respondent provided economic justifications for interjecting the proposal at that time. Furthermore, we note that the parties did not appear to be near overall agreement when the Respondent made its proposal, the parties did bargain about limitations on the new proposal, and the Respondent evinced a willingness to accept limitations.

[3] All subsequent dates are in 1995, unless otherwise stated.

[4] For the reasons set forth in *Hacienda Resort Hotel and Casino*, 331 NLRB No. 89 (2000), we affirm the judge's conclusion that the Respondent's cessation of union dues checkoffs was lawful. Member Fox, for the reasons stated in the dissent in *Hacienda Resort Hotel*, would include the cessation of dues checkoff among the unlawful unilateral changes imposed by the Respondent.

[5] For reasons expressed in the dissent in *Detroit Newspapers*, Member Fox would find that the Respondent violated Sec. 8(a)(5) by unilaterally setting the terms and conditions of employment for striker replacements.

vious section, however, the Respondent could lawfully change the terms of employment for strike replacements without bargaining.[6] We therefore find that the Respondent did not violate Section 8(a)(5) until December 10 when it failed to make pension fund payments on behalf of crossover employees who abandoned the strike and returned to work during the month of November.[7]

3. The judge found that the strike was an economic strike in its inception but that certain of the Respondent's unfair labor practices prolonged the strike and converted it to an unfair labor practice. He rejected the argument that this conversion took place on October 23, when the Respondent's president, Howard Shea, unlawfully bypassed the Union and engaged in direct dealing during a lengthy conversation with striking unit employee, Wallace Penniman, about the contract negotiations. Instead, the judge found that the strike converted on November 14 when the Union learned about the Respondent's unlawful unilateral changes through its failure to make pension payments for the month of October. He further found that the Respondent's December 7 withdrawal of recognition was also sufficient to have converted the strike.

Based on our finding in the preceding section that the Respondent did not unlawfully fail to make pension fund payments in November, we disavow reliance on that event as having converted the strike into an unfair labor practice strike.

Rather, contrary to the judge, we find that it was the Respondent's unlawful conduct on October 23 that converted the strike into an unfair labor practice strike as of that date. Based on the credited testimony of employee Penniman,[8] Respondent's President Shea invited Penniman off the picket line to take a car ride. During the ensuing 3-hour round trip, Shea discussed the contract negotiations at length. He told Penniman that it was the Union's fault because they were not negotiating with the Company, asked Penniman what the employees wanted, and sought to minimize the Respondent's bargaining demands. After the ride, Penniman returned to the picket line and discussed Shea's remarks with other strikers. Credible testimony shows that these remarks became a source of controversy among the strikers and among the Union's negotiators, who became aware of them.

It is well-established that any unfair labor practice occurring after the commencement of an economic strike does not ipso facto convert that strike into an unfair labor practice strike. The General Counsel bears the burden of proving that an unfair labor practice was a factor in prolonging the strike. *C-Line Express*, 292 NLRB 638 (1989). In assessing the evidence of strike causation, the Board relies on both objective and subjective considerations. Objectively, "[c]ertain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding conversion." Id. These violations warrant the Board's judgment "that the employer's conduct is likely to have significantly interrupted or burdened the course of the bargaining process." Id.

In this regard, the Board has several times held that an employer's unlawful efforts to bypass the union representative and to deal directly with bargaining unit employees is objectively "such as could not help but prevent and inhibit good-faith bargaining, thereby prolonging the strike." *Safeway Trails*, 233 NLRB 1078, 1082 (1977), enfd. 641 F.2d 930 (D.C. Cir. 1979), cert. denied 444 U.S. 1072 (1980).[9] We find that objective inference to be applicable here to President Shea's unlawful conduct. Furthermore, the inference is supported by credible subjective evidence of the divisive effect of this conduct on the strikers and their union negotiators, after Shea's remarks were quickly disseminated among them.

As for the Respondent's unlawful changes based on its implementation of the October 2 bargaining proposal, we agree with the contention made by the National Shopmen Pension Fund that the employees must have been aware of changes no later than November 11. On that date, which would have been a holiday under the expired con-

[6] As noted above, Member Fox disagrees with this finding.

[7] In light of our finding that the Respondent could lawfully change the terms and conditions of employment for striker replacements without bargaining, we need not pass on the General Counsel's motion to withdraw his exception 16. In addition, we do not rely on the Respondent's unlawful cessation of pension fund payments in December in affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Union in the context of unremedied unfair labor practices on December 7.

[8] In affirming the judge's crediting of the testimony of Penniman over the testimony of Respondent's President Shea, we rely only on the judge's impressions of the witnesses' relative demeanor. We do not rely on the judge's statement that Penniman's stake in the outcome of this proceeding is "limited." The Respondent correctly notes in exceptions that Penniman was an unreinstated striker and therefore did have a significant continuing interest in this proceeding.

[9] See also *Beaumont Glass Co.*, 310 NLRB 710, 719 (1993), and cases cited there. Our dissenting colleague's attempt to distinguish *Beaumont Glass* is unavailing. The strike conversion finding in *Beaumont Glass* rested on the single instance of the respondent's direct distribution of a memo to employees advancing a proposal that had not been made to the union in negotiations. We find that Respondent's President Shea engaged in markedly similar conduct by using Penniman as a conduit for advancing proposals to employees that differed significantly from those previously made to the Union in negotiations. As in *Beaumont Glass* (and unlike in *Forest Grove Lumber Co.*, 275 NLRB 1007 fn. 1 (1985), upon which both the dissent and the judge rely here), Shea's conduct represented an attempt to undercut the union representative that had a proven deleterious impact on subsequent negotiations.

tract, striking employees on the picket line as well as crossover employees who were then working would certainly have recognized that there had been a unilateral change in holiday policy, in derogation of the bargaining process. In conjunction with Shea's earlier bypass of the Union, it can be inferred that the Respondent's unilateral changes were also unfair labor practices that prolonged the strike.

Based on the foregoing, we agree with the judge that the Respondent unlawfully refused to offer immediate reinstatement to returning unfair labor practice strikers. However, we do not agree with his conclusion that *all* strikers were entitled to reinstatement as of December 7, the date of their offer to return to work. The record shows that the Respondent began hiring striker replacements in October. Only those strikers whom the Respondent had not permanently replaced prior the strike's conversion on October 23 from economic to unfair labor practice status were entitled to the immediate reinstatement rights of unfair labor practice strikers. *Rose Printing Co.*, 289 NLRB 252, 253 (1988). Strikers whom the Respondent permanently replaced prior to the conversion date have only the preferred reinstatement right of economic strikers. We leave to compliance the determination of which returning strikers were unfair labor practice strikers and are entitled as such to a full reinstatement and backpay remedy.

4. We agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. In contrast, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, we note that, in addition to unlawfully withdrawing recognition, the Respondent's other unfair labor practices were serious and numerous. These included bypassing the Union as the employees' representative for collective bargaining by soliciting the sentiment of employees about matters which were the subject of negotiation; making unilateral changes in wages, hours, and other terms and conditions of employment without first bargaining with the Union to impasse; and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work. Further, although several years have elapsed since these unfair labor practices were committed, many of them were of a continuing nature and would likely have a long-lasting effect.

We further note that, as found by the judge, the petition upon which the Respondent relied in withdrawing recognition on December 7 did not reflect free choice under Section 7 but rather the effect of the Respondent's unfair labor practices which preceded the withdrawal of recognition. We find that these additional circumstances further support giving greater weight to the Section 7 rights that were infringed by the Respondent's unlawful withdrawal of recognition.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining or to engage in any other conduct designed to further discourage support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease and desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and many of the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

AMENDED REMEDY

Contrary to the judge, we find that a broad cease-and-desist Order is not appropriate because the Respondent has not been shown to have a proclivity to violate the Act or a general disregard for employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1979). Further, the Respondent shall make unit employees whole for losses resulting from its unlawful unilateral changes in accord with *Ogle Protection Service*, 183 NLRB 682 (1970), and it shall make the National Shopmen Pension Fund whole for unlawfully withheld contributions, including any additional amounts applicable to such delinquent payments as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). We shall also modify the contingent notice-mailing provision in the judge's recommended order in accord with *Excel Container*, 325 NLRB 17 (1997).

Finally, we have found that the economic strike that began on September 11, 1995, was converted to an unfair labor practice strike on October 23, 1995. We have further found that the Respondent unlawfully refused to reinstate unfair labor practice strikers following their unconditional offers to return to work. Accordingly, with respect to those former unfair labor practice strikers who were not offered immediate reinstatement, we shall require the Respondent, if it has not already done so, to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after October 23, 1995. If, after such dismissals, there are insufficient positions available for the remaining former unfair labor practice strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. The remaining former unfair labor practice strikers, as well as those former strikers who were permanently replaced prior to the conversion, for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements. See *Gaywood Mfg. Co*., 299 NLRB 697, 700–702 (1990); *Chicago Beef*, 298 NLRB 1039 (1990), enfd. mem. 944 F.2d 905 (6th Cir. 1991). Former unfair labor practice strikers who were denied immediate reinstatement in response to their unconditional offer to return to work shall also be made whole for any loss of earnings they may have suffered. Backpay shall be computed as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Ryan Iron Works, Inc., Raynham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union as the employees' representative for collective bargaining by soliciting the sentiment of employees about matters which are the subject of negotiations.

(b) Making unilateral changes in wages, hours, and other terms and conditions of employment, except for the terms and conditions for strike-replacements hired during a strike, without first bargaining with the Union to impasse.

(c) Withdrawing recognition from the Union as the collective-bargaining representative of employees in a unit appropriate for collective bargaining.

(d) Refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the

following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Respondent at its Raynham, Massachusetts locations, but excluding office and clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors as defined in the Act.

(b) On request of the Union, rescind the unilateral changes made on and after November 6, 1995, reinstating the prior terms and conditions of employment for bargaining unit employees, and make whole both the unit employees, with interest, and the National Shopmen Pension Fund for losses resulting from these unilateral changes.

(c) Within 14 days from the date of this Order, offer those former unfair labor practice strikers who the Respondent has not yet reinstated since their unconditional offer to return to work full and immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary, any replacements hired on or after October 23, 1995.

(d) Place any remaining former strikers for whom no employment is immediately available, on a preferential hiring list in accordance with their seniority or other established nondiscriminatory recall practice and offer them employment before any other persons are hired or on the departure of any replacements hired before October 23, 1995.

(e) Make whole former unfair labor practice strikers, who had not been replaced prior to October 23, 1995, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Raynham, Massachusetts, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

MEMBER HURTGEN, dissenting in part.

For the reasons stated by the judge, I agree with the majority that the strike that the employees commenced against the Respondent on September 11, 1995, was an economic strike. However, contrary to my colleagues, I find that this strike did not subsequently convert to an unfair labor practice strike. Thus, the record fails to establish that either the single incident of unlawful direct dealing on October 23, 1995, or the Respondent's implementation of some of its bargaining proposals during the strike converted the economic strike into an unfair labor practice strike.

The theory underlying the "conversion" doctrine is that certain employer unfair labor practices can prolong an economic strike by delaying a settlement that otherwise would have been reached on the economic issues. "Conversion" will not be presumed, however. It is well settled that employer commission of unfair labor practices during an economic strike does not ipso facto convert it into an unfair labor practice strike. See, e.g., *C-Line Express*, 292 NLRB 638 (1989). Rather, a causal connection must be shown between the unfair labor practice(s) and the continuation of the strike. *Anchor Rome Mills*, 86 NLRB 1120 (1949). To establish this causal connection, "the General Counsel must prove that the unlawful conduct was a factor (not necessarily the sole or predominate one) that caused a prolongation of the work stoppage." *Chicago Beef Co*., 298 NLRB 1039 (1990), enfd. 944 F.2d 905 (6th Cir. 1991). Phrased differently, an economic strike will be found to have converted "only

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where there is substantial evidence that the unfair labor practice prolonged the strike." *NLRB v. Burkart Foam*, 848 F.2d 825, 832 fn.6 (7th Cir. 1988).[1] The burden is on the General Counsel to establish conversion. In meeting this burden, the General Counsel can rely on subjective and objective factors.[2] Here, the General Counsel did not satisfy that burden.

1. October 23 incident

Unlike my colleagues, I agree with the judge that the October 23 direct dealing/bypassing violation did not convert the strike. This was an isolated incident in which the Respondent questioned a single employee as to what employees wanted in negotiations, and explained the Respondent's bargaining proposals. While violative of Section 8(a)(5), I cannot find that this single incident prolonged the strike.

In this regard, I do not agree with my colleagues that the October 23 incident is of a type which—on objective grounds—converts an economic strike into an unfair labor practice strike without regard to the strikers' subjective views. *Forest Grove Lumber Co.*, 275 NLRB 1007 (1985).[3] The cases on which the majority relies to support their contrary conclusion are inapplicable. Thus, in *Safeway Trails, Inc*., 233 NLRB 1078 (1977), enfd. 641 F.2d 930 (D.C. Cir. 1979), unlike here, the respondent engaged in "egregious effort[s] . . . to obtain the employees' repudiation of their union representative as a precondition to revoking a collective-bargaining agreement." *Forest Grove Lumber Co.*, supra at fn. 1. And in *Beaumont Glass Co.,* 310 NLRB 719 (1993), rather than the single incident here at issue, directed at one unit employee, there were multiple instances in which various management officials bypassed the union and dealt directly with several employees. Additionally, the incident which was found to have converted the strike in *Beaumont* consisted of management directly distributing memos to its employees informing them (before it informed the union) of the employer's new bargaining proposal. Contrary to my colleagues, there is no "marked similarity" between such a direct communication with all employees and the one-on-one conversation at issue in this case. Nor is there support for my colleagues' contention that the Respondent used Penniman as a conduit to advance its bargaining positions. Finally, unlike *Beaumont*, where there was tangible, credited evidence that the employer's distribution of its proposal had the effect of destroying negotiations and terminating any meaningful bargaining, there is no support for the majority's assertion that the October 23 incident had "a proven deleterious impact on subsequent negotiations." As case law makes clear, "mere conjecture will not suffice." (See fn. 1.) Nor will my colleagues' unsupported claims.

Even when considered in so-called context, the October 23 incident did not convert the strike. In this regard, I note that there is no finding that the Respondent engaged in bad-faith bargaining. Further, negotiations continued unabated after the October 23 incident. The fact that these negotiations did not produce an agreement was, as in *Forest Grove*, due to the parties' inability to agree on the terms of a new contract, and not because of the October 23 incident. See also *Anchor Rome Mills*, supra, 86 NLRB at 1122.

Further, like the judge, I find no basis for the majority's conclusion that subjective evidence establishes that the October 23 incident prolonged the strike. This conclusion ignores the judge's clear (and correct) finding that "there is simply no evidence that the employees continued to strike because of [this incident]." See, also, *F.L. Thorpe & Co*., 315 NLRB 147, 159 (1994), enfd. in relevant part 71 F.3d 282 (8th Cir. 1995). Indeed, the record is devoid of evidence that employees considered or discussed the October 23 incident in terms of its effect on the strike, or that they took concrete steps to indicate that this incident prolonged the strike. Cf. *Superior National Bank & Trust*, 246 NLRB 721 (1979). The mere fact that some employees discussed the incident among themselves falls far short of establishing that this was a basis for continuing the strike.[4]

[1] As stated by the Tenth Circuit in *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 977 (1990), "there must be some evidence in the record that the . . . employees reacted to the information of [respondent's] direct dealing substantively in a fashion which aggravated or prolonged the strike. [Cite omitted] Mere conjecture will not suffice."

[2] "Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and the court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice." *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981).

[3] Unfair labor practices which have been found to convert strikes without regard to subjective evidence include, among other things, withdrawal of recognition from the exclusive bargaining representative (*Rose Printing Co.*, 289 NLRB 252, 253 (1988); refusal to reinstate economic strikers *(Gloversville Embossing Corp.,* 297 NLRB 182, 183 (1989)); and termination of strikers (*Vulcan-Hart Corp*., 262 NLRB 167, 168 (1982), enf. denied on other grounds 718 F.2d 269 (8th Cir. 1983). Contrary to the majority, I do not find that the same conclusion attaches where the unfair labor practice involves a single Sec. 8(a)(5) unlawful bypassing and direct dealing violation such as that at issue in this case. *Forest Grove Lumber Co*., supra, 275 NLRB 1007 at fn. 1, 1012–1013.

[4] This is particularly true here where the theme of these discussions about the October 23 incident was initially optimism that negotiations would soon conclude in an agreement, followed by anger at the Union whom the employees blamed for not getting an agreement. In these circumstances, it is clear that the October 23 incident reasonably could

2. Implementation of bargaining proposals

Finally, I do not agree that the Respondent's implementation of certain of its bargaining proposals during the strike converted it to an unfair labor practice strike (as found by the judge) or further evidenced its conversion (as found by the majority). There is neither a claim nor any evidence that the Union or striking employees knew during the strike that the Respondent had instituted certain of its bargaining proposals for employees who crossed the picket line. *Robbins Co.*, 233 NLRB 549 (1977). And, I find wholly unpersuasive my colleagues attempt to infer such knowledge on the basis that striking employees "would certainly have recognized that there had been a unilateral change in holiday policy," because crossover employees worked on November 11, 1995 (Veterans' Day), which was a holiday under the expired agreement. The phrase "would certainly have recognized" is instructive. It is used to mask the fact that there is no actual evidence of knowledge. More particularly, there is no record evidence that: (1) picketing occurred on November 11; or that (2) crossover employees worked that day.

Further, even assuming arguendo that the record established the foregoing, there is absolutely no evidence that the striking employees discussed the change or relied on the events of November 11 as a basis for prolonging their strike. Finally, and perhaps most tellingly, it is most unlikely that employees would continue to strike to protest the terms and conditions of employment of crossovers (i.e., employees who had abandoned the strike).

Accordingly, I find that the September 11 economic strike did not convert to an unfair labor practice strike.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT bypass the Union as the employees' representative for collective bargaining by soliciting the sentiment of employees about matters which are the subject of negotiations.

WE WILL NOT make unilateral changes in wages, hours, and other terms and conditions of employment, except for the terms and condition for strike-replacements hired during a strike, without first bargaining with the Union to impasse.

WE WILL NOT unlawfully, and without proper cause, withdraw recognition from the Union as the collective-bargaining representative of employees in a unit appropriate for collective bargaining.

WE WILL NOT refuse on request to reinstate unfair labor practice strikers who were not permanently replaced prior to conversion of the strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by the Respondent at its Raynham, Massachusetts location, but excluding office and clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors as defined in the Act.

WE WILL, on request of the Union, rescind the unilateral changes made on or about November 7, 1995, reinstate all terms and conditions of the 1972–1975 collective-bargaining agreement between the Respondent and the Union, and make whole the affected employees for losses incurred by virtue of the implementation of the unilateral changes, with interest.

WE WILL make whole the National Shopmen Pension Fund for any losses as a result of our unilateral cessation of payments to the Fund.

WE WILL, within 14 days of the Board's Order, offer all employees engaged in an unfair labor practice strike who were not permanently replaced prior to October 23, 1995, and were not subsequently offered reinstatement by us, immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacement hired on or after October 23, 1995.

WE WILL place the remaining former strikers who were not replaced prior to October 23, 1995, as well as those former strikers who were permanently replaced prior to October 23, 1995, for whom no employment is

not have prolonged the economic strike. If anything, it would appear to have shortened it.

immediately available, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice and offer them employment before any other persons are hired or on the departure of any replacements hired before October 23, 1995.

WE WILL make whole all unfair labor practice strikers who were not permanently replaced prior to October 23, 1995, to whom the Respondent failed to offer reinstatement upon their unconditional offer to return to work, for any loss of earnings which they may have suffered with interest.

RYAN IRON WORKS, INC.

Thomas J. Morrison, Esq., for the General Counsel.
Robert P. Corcoran, Esq., of Boston, Massachusetts, for the Respondent.
Marc Rifkind, Lynn A. Bowers, and *Mary T. Sullivan, Esqs.,* of Boston, Massachusetts, for the Pension Fund Trustees.
Alan H. Shapiro, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Boston, Massachusetts, on July 15 and 16, 1996, upon the General Counsel's complaints which allege various violations of Section 8(a)(5) of the National Labor Relations Act (the Act). It is also alleged that the employees engaged in an unfair labor practice strike and the Respondent's subsequent refusal to reinstate them on demand violated Section 8(a)(3) of the Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that it bargained in good faith. The Respondent further contends that at all times the strike was economic and that the strikers were lawfully permanently replaced.

Upon the record[1] as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order.

I. JURISDICTION

The Respondent is a Massachusetts corporation engaged in the fabrication of iron, steel, and metal products at a facility in Raynham, Massachusetts. The Respondent annually sells and ships directly to points outside the Commonwealth of Massachusetts, goods valued in excess of $50,000 and annually receives directly from points outside the Commonwealth of Massachusetts goods valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

[1] The Respondent's motion to correct transcript is entered into the record as R. Exh. 9 and, absent objection, is granted. There are other transcript errors which are obvious or trivial and are not formally corrected.

II. THE LABOR ORGANIZATION INVOLVED

Shopmen's Local 501, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts in General

For about 26 years the Union has been the bargaining representative for a unit of the Respondent's shop employees. The parties have negotiated a series of collective-bargaining agreements, the most recent of which was effective from September 11, 1992, to September 10, 1995.[2] After some delay, occasioned by both the Union and the Respondent, the parties met for the first time on August 28 to begin negotiations for a successor agreement. The Union presented a list of demands, which included an increase in the hourly wage and increases in other benefits. By the Union's accounting, the Respondent proposed to reduce wages and benefits in 14 areas (later increased to 15 when the Respondent added a change to the subcontracting clause). Regardless of whether each of the Respondent's proposals in fact amounted to an economic concession, no doubt the Respondent proposed certain reductions from the existing conditions.

At the first meeting, and subsequently, the Respondent stated that it needed economic relief in order to remain competitive. The Union spokesmen stated without reservation that they would not agree to any givebacks. While the basic positions of the parties did not change from the first meeting, the Respondent did increase its health plan offer and the Union came off slightly from its wage demand (75-cent to 50-cent increase each year) and pension contribution, and on November 16 offered a wage and benefits freeze for 1 year.

On September 7 the Union filed the original charge in Case 1–CA–33353 alleging that "Since on about August 31st 1995, the above named Company has been engaging in bad faith bargaining by its unreasonable demands and delays." And on September 8, officials of the Union met with the employees to present and vote on the Respondent's proposal. It was unanimously rejected. Then the employees voted on whether to strike, being advised that the Union had filed the charge and being told that any strike would be "an unfair labor practice strike" and they could not therefore be permanently replaced. The employees voted in favor of striking.

The strike and picketing began the following Monday, on September 11. The parties met again on September 18, October 2 and 25, and November 10 without success. In October the Respondent began hiring replacements (most of whom were hired in November). However, the Respondent did not make contributions on their behalf pursuant to obligations under the expired contract, or even its 401(k) proposal. In other respects the Respondent implemented the changes proposed on October 2 when replacements were hired and certain employees abandoned the strike.

[2] Hereafter, all dates are in 1995 unless otherwise indicated.

By letter of November 16 the Union withdrew its previous proposals and offered a 3-year contract without changes, a wage freeze for 1 year, and a wage and pension fund reopener for the second and third years. On November 21 the Respondent notified the Union than this proposal was rejected, however, they were willing to meet to "discuss the significant differences" between their offers.

On December 6 or 7 a petition purportedly signed by 55 employees to the effect they did not want to be represented by the Union was delivered to Production Manager, Paul Chase. Offered in evidence by the Respondent were summaries taken from its employment records showing that as of December 7 there were 34 replacements, and as of November 17 there were 18 crossovers. On December 7 the Respondent notified the Union by letter that it "does not believe that Local 501 represents a majority of our employees," and therefore withdrew recognition. On December 11 the striking employees offered themselves for reinstatement. This was denied on grounds they had been permanently replaced. Subsequently, all but 12 of the original 61 strikers have been offered reinstatement.

By its bargaining tactics and other acts, the Respondent is alleged to have breached its duty to bargain in good faith, engaged in coercive conduct, and unlawfully refused immediate reinstatement to the strikers.

B. Analysis and Concluding Findings

1. Videotaping the picketline

It is alleged that on September 14 and continuing until October 26, the Respondent engaged in unlawful surveillance of employees participating in protected concerted activities by installing video cameras to monitor the picketline.

Unquestionably the Respondent did install such cameras. According to the testimony of executive vice president and treasurer, Paul Kelley, this was done on the advise of the security company hired during the strike. The Respondent maintains that such was a necessary and reasonable security response to mass picketing, coffee being thrown on cars entering the premises, and tacks being put on the driveway.

The evidence concerning this allegation is limited; however, Chase testified without contradiction that during the first 3 days of the strike pickets blocked the entrance to the plant from highway 138, coffee was thrown on the windshield of the company truck he was driving, and his own vehicle was spit upon. This evidence of misconduct was uncontested and I find occurred generally as testified to by Chase.

In *F. W. Woolworth Co.,* 310 NLRB 1197 (1993), the Board stated that it "has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate," citing *Waco, Inc.,* 273 NLRB 746 (1984). In *United Food* and *Waco* there was no evidence of even minimal picketline misconduct. Here, on the other hand, there is credible evidence of minor incidents in the first days of the picketing. I believe such was sufficient to justify the Respondent in accepting the advice of the security firm it hired and place video cameras.

A company has a legitimate business interest in insuring that picketing of its premises is peaceful and that pickets do not engage in personal or property damage or block the entrance. Such evidence as there is, though minimal, is sufficient to establish such a predicate. Where there has been some picketline misconduct, even though minor, placing video cameras at the entranceway would not reasonably implant in the minds of employees that the photographing had a reprisal purpose beyond protecting the employer's property and nonstriking employees. I therefore conclude that the Respondent did not violate Section 8(a)(1) of the Act by placing the video cameras, and I shall recommend that paragraph 7 of the complaint in Cases 1–CA–33353 and 1–CA–33762 be dismissed.

2. Bargaining in bad faith

It is alleged that the Respondent "entered into negotiations with the fixed intention of frustrating agreement or of reaching agreement only on its own terms;" and second, "failed to make substantial changes in its initial bargaining proposals, despite the Union's numerous substantial changes in its bargaining proposals."

These allegations of bad-faith bargaining form the principal issue of this case. As noted above, the Respondent presented a contract proposal which contained numerous cuts in wages and benefits. The union's proposal called for increases; and during negotiations, spokesmen for the Union adamantly stated that they would never agree to any reductions in wages or benefits. David Mortimer, the Union's business agent, testified that the Respondent's proposal was "an insult and a piece of garbage," that they had "given concessions over the years," and by his reckoning, the men had given up about 70 cents per hour. This estimate was neither confirmed by objective evidence nor disputed.

The General Counsel contends that the Respondent's position was so unreasonable as to amount to a refusal to bargain, whereas the Union's equally strong opposing position was acceptable. It is not a function of the Board to decide which party has been the more reasonable in negotiations, or whether a particular position or set of positions taken by a party is justified. The Board's function is to insure that each party approaches negotiations with an open mind. Thus, in *Reichhold Chemicals,* 288 NLRB 69 (1988), the Board held that in appropriate circumstances "specific proposals might become relevant in determining whether a party has bargained in bad faith." However, in reading a party's proposals, the Board will not decide whether they are "acceptable" or "unacceptable." Rather, the Board will analyze the proposals and "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."

The General Counsel's theory is that the Respondent's objective behavior—as demonstrated by its proposals and its refusal to change them—proves that it never intended to engage in meaningful bargaining. However, the testimony and exhibits do not support such a conclusion. The Union was quite adamant that it would not agree to "givebacks." The Respondent was adamant that it had to have concessions in order to be competitive with nonunion companies. Indeed, the Respondent's bargaining posture here is similar to that held lawful in *Concrete Pipe & Products Corp.,* 305 NLRB 152 (1991),

where the Board rejected the judge's subjective evaluation of the company's proposals as being inherently unreasonable.

The allegation that the Respondent "failed to make substantial changes in its initial bargaining proposals, despite the Union's numerous substantial changes in its bargaining proposals," even if factually true does not make out an unfair labor practice. The Act does not require a party to make concessions in negotiations simply because the other party does. Beyond that, the record here does not support the factual accuracy of this allegation. While the Union did reduce its wage, pension, and health insurance demands it is questionable that such reductions were "substantial" until the proposal of November 16. Further, at the second bargaining session (on August 31) the Respondent amended its health care plan proposal—though by an insufficient amount to satisfy the Union, since the proposal still called for reductions from the previous contract.

Whether the Respondent would have further amended any of its demands had the Union been willing to bargain concerning them is, of course, unknown. It was the Union's beginning position, and the one it took into the strike, that it would not accept or discuss the Respondent's proposals. At the first session, and thereafter, the Respondent's spokesmen stated that they did not need each issue as written, but wanted to discuss them all. Robert Thomas, organizer for the International Union, testified that at the August 31 meeting he said "your proposal stinks and we don't want to talk about it" admitting that he probably used stronger language than "stinks."

The asserted basis for the Respondent's bargaining position was economic—that it was not able effectively to compete with nonunion contractors. According to Kelley, they were not getting their share of contracts and the last year was a "real bad year." This testimony is dubious, since he also testified that the Company was working about 300 hours of overtime a week (about five and one half hours per bargaining unit employee). Thus, in the late summer, the Respondent had hired 7 new employees bringing the complement to 61. On the other hand, company records indicate that sales for the year ending March 29, 1992, exceeded $15 million whereas sales for the year ending April 2, 1995, were under $11 million. Nevertheless, the logic of the Respondent's economic argument is not for the Board to decide, unless it is so clearly irrational as to require the conclusion that the position was taken in order to frustrate agreement. *Reichhold Chemicals, supra.* Here the evidence does not show clearly that the Respondent's economic argument was bogus.

The parties met on August 18, 29, 31 and September 8 (with a Federal mediator). During the session of August 31 the Respondent made some alterations in its health care proposal, however the Union considered these no change in the company's overall economic presentation. At the meeting of September 8 neither party changed position, thus, the proposal presented to the membership that day was the Respondent's August 31 proposal.

The Union maintains that previous concessions amounted to 70 cents per hour. Therefore, the Respondent's demand for more concessions was an unlawful refusal to bargain, and so informed the membership on September 8 prior to taking a strike vote. The Union spokesmen said that the strike would be an unfair labor practice strike, and on September 7 they had filed an unfair labor practice charge in order to get the company "off the dime."

After, but, four negotiation sessions, at which some items were discussed but with the Union stating unequivocally that it would not discuss economic concessions, the objective facts simply do no support the conclusion that the Respondent bargained in bad faith as alleged in paragraph 12 (a) and (b) of the complaint in 1–CA–33353 and 1–CA–33762.

In paragraph 13 of that complaint, it is alleged that on "October 2, 1995, Respondent, during negotiations, introduced a subcontracting proposal that was regressive, harsh, vindictive, and otherwise unreasonable," and, thus, violative of Section 8(a)(5).

In the expired contract, section 1 (C) reads:

> The foregoing provisions notwithstanding, it is agreed that the Company has the right in the exercise of its sole discretion to subcontract work when, in the Company's exclusive judgment, it is necessary to do so. It is further agreed, however, that the Company will not subcontract work which has regularly, exclusively, and historically been performed by bargaining unit employees.

In the Respondent's proposal of October 2, this language was changed to read:

> The foregoing provisions notwithstanding, it is agreed that the Company has the right in the exercise of its sole discretion to subcontract work when, in the Company's exclusive judgment, it is necessary to do so, *including the right to subcontract any part of a contract when the Company feels the work in question can be performed more economically or efficiently by another shop*. It is further agreed, however, that the Company will not subcontract *an entire contract where the* work involved has regularly, exclusively, and historically been performed by bargaining unite employees. (Added language emphasized.)

The General Counsel argues that the Respondent violated Section 8(a)(5) by proposing to add the parenthetical phrase "including the right to subcontract any part of a contract when the Company feels the work in question can be performed more economically or efficiently by another shop," even if the work had historically been performed by unit employees.

Though a proposal which is "regressive, harsh, vindictive and otherwise unreasonable" might be considered objective evidence of unlawful bargaining under *Reichhold Chemicals,* the language in question here is none of these. The proposal would give the Respondent increased freedom to subcontract (allowing for partial but not total subcontracting of a contract) but such does not seem much of a change. The basis for this proposal was the Respondent's experience during the strike that some portions of its contracts could be done more efficiently by other shops. The Respondent's position is not so unreasonable as to support a finding that objectively, by this proposal the Respondent engaged in bad faith bargaining.

I therefore conclude that the Respondent did not engage in subjective bad faith in making its proposals as alleged in paragraphs 12 and 13 of the complaint.

3. Bypassing the Union

In paragraph 14 is alleged that on October 23 Howard Shea, the Respondent's president, "bypassed the Union and dealt directly with its employees in the unit concerning ongoing negotiations."

Wallace Penniman testified that one day in October as he was walking the picketline, and Shea was leaving in his car, Shea stopped and asked Penniman to take a ride with him. According to Penniman, Shea asked how things were going, "that it was the Union's fault because they weren't negotiating with the Company" and so on. After these preliminaries, Shea asked what the men wanted exactly. Penninman said the main thing was seniority. And they talked about some of the other proposals, including "that he was going to need another three year pay freeze to be competitive with the non-union shops." They discussed the pay freeze matter, as well as vacations, holidays, work boots (the Respondent in fact accepted the Union's proposal raising the workboot allowance from $25 to $50), subcontracting, pension, and health insurance and arbitration. According to Penniman, their discussion was extensive, as they drove to Waltham and back, a total trip of about 3 hours.

Shea testified that he took Penniman for the ride because he wanted company and they discussed nothing about the contract negotiations. He did admit, however, that he told Penniman "that the union doesn't seem to be dealing with anything that we had on the table." I do not believe Shea. I was more impressed with Penniman's demeanor. Beyond that, Penniman is no longer an employee of the Respondent and is no longer a member of the Union; therefore, his stake in the outcome of this proceeding is limited. It is simply incredulous that Shea would take a striking employee for a ride and not discuss the most pressing concern of everyone associated with the Respondent.

I find, in fact, that Shea solicited the sentiment of employees about matters which were the subject of negotiations. While I make no judgment as to Shea's motive, I do find that he dealt directly with an individual employee concerning negotiations, and, thus, bypassed and undermined the Union. *Harris-Teeter Super Markets,* 310 NLRB 216 (1993).

The Respondent thereby violated Section 8(a)(5) of the Act as alleged in paragraph 14 of the complaint in Cases 1–CA–33353 and 1–CA–33762.

4. Modifications of the collective-bargaining agreement

It is alleged and admitted that on December 11 the Respondent changed and modified several clauses of the expired collective-bargaining agreement relating to unit work, dues checkoff, overtime pay, holiday pay, classification-work assignment-rates of pay, vacations, welfare benefits, seniority, and safety and health.[3] It is alleged that these matters relate to wages, hours, and terms and conditions of employment (which they clearly do) are therefore mandatory subjects of collective bargaining (which they clearly are). It is also alleged that the changes were unilateral and therefore violative of Section 8(a)(5). The parties stipulated that the Respondent "implemented the terms of its October 2nd offer when crossover employees began abandoning the strike and returning to work on November 6th."

It has long been held that following an impasse in negotiations, an employer does not violate its bargaining duty by making unilateral changes reasonably encompassed by its pre-impasse proposals. *NLRB v. Katz,* 369 U.S. 736 (1962); *Blue Circle Cememnt Co.,* 319 NLRB 954 (1995).

The changes implemented were proposals which the Respondent made at the outset of negotiations and which the Union refused to consider, stating that it would never agree to any "givebacks." During the 4 months of negotiations, and pressure of an economic strike, there was little movement on these issues, although the Union did make concession on its proposed wage and pension increases and the Respondent did agree to the Union's proposed shoe allowance and altered its proposal on health insurance. However, the limited movement does not mean there was impasse. While the parties were apparently far apart, credible testimony shows that the Respondent was not adamant on all its proposals. More importantly, the Respondent never communicated to the Union that failure to achieve its demands would result in a deadlock, or that there was an impasse and that the Respondent would implement its proposals.

In *Taft Broadcasting Co,* 163 NLRB 475, 478, (1967), the Board held:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Here there was no contemporaneous understanding that the parties were at impasse. Indeed, in his letter of November 21, Counsel for the Respondent stated that the Union's most recent proposal (November 16) was unacceptable but suggested a willingness to meet and discuss "the Company's outstanding offer of October 2nd." He did not suggest impasse and I conclude there was none. "The failure of a party to communicate to the other party the paramount importance of the proposals presented at the bargaining table or to explain that a failure to achieve concessions would result in a bargaining deadlock evidences the absence of a valid impasse." *Hotel Roanoke,* 293 NLRB 182, 185 (1989), and cases cited. The Union could not reasonably have been on notice that the Respondent would implement any part of its proposal unilaterally.

Thus, I conclude that the Respondent did violate Section 8(a)(5) by implementing its proposals, except for ceasing dues checkoff. It is well settled that employees' authorization to have dues deducted from pay does not survive the termination of the collective-bargaining agreement authorizing such deductions. *Tampa Sheet Metal Co.,* 288 NLRB 322 (1988). Counsel for the General Counsel argues that this long-standing interpretation of Section 302 of the Act should be overruled. Ab-

[3] Case 1–CA–34066.

sent some compelling reason, I will not recommend that the Board change the law in this area.

5. Ceasing pension plan payments

Additionally, it is alleged, and admitted, that on November 10 the Respondent stopped making pension payments on behalf of unit employees to the National Shopmen Pension Fund, as required by section 14(A) of the collective-bargaining agreement.[4]

The Respondent's contract proposal was to "delete Section 14A in its entirety, cease all contributions to the National Shopmen Pension Fund, and substitute a 401(k) retirement plan as presented in negotiations." On November 10 the Respondent admittedly ceased making the payments required under the expired contract. In fact it did not make October payments for the replacement employees hired in October. The Respondent defends this action on a claim that it intended to put the payments into a 401(k) plan, which was its preimpasse offer, but it takes time and preparation to implement such a plan; and, on December 7, the Respondent lawfully withdrew recognition thereby obviating the necessity to continue making payments, or even implement its 401(k) proposal.

The time delay excuse is weak in the extreme; but additionally, ceasing payments unilaterally, where there was no impasse, was unlawful. Those striking employees who crossed the picket line in November, and the newly hired employees, were entitled to have the payments made on their behalf. Unlike dues checkoff, pension plan payments do survive expiration of the collective-bargaining agreement. *Tampa Sheet Metal Co.,* supra. Ceasing to make these payments was a significant breach of the Respondent's bargaining duty and was violative of Section 8(a)(5).

6. Withdrawal of recognition

On December l7, Paul Kelley sent David Mortimer, the Union's business agent, the following letter:

> Please be advised that Ryan Iron Works does not believe that Local 501 represents a majority of our employees. Accordingly, Ryan Iron hereby withdraws recognition from Local 501 as the bargaining representative of the Ryan Iron employees.

The Respondent argues that it was justified in withdrawing recognition because it had hired 34 permanent replacements during the strike and that 55 active employees had signed a petition stating they no longer wished to be represented by the Union.

Although the Board does sanction an employer's withdrawal of recognition where it has objective evidence that the Union no longer represents a majority of employees, such withdrawal must be in a context free from unfair labor practices. E.g., *Bartenders Association of Pocatello,* 213 NLRB 651 (1974).

Here, I conclude, the withdrawal was not in a context free from unfair labor practices. Specifically, I conclude that the Respondent unlawfully sought to bypass the Union and deal directly with employees. And, the Respondent unlawfully implemented changes in the terms and conditions of employment beginning in October with its failure to submit pension payments on behalf of newly hired and crossover employees.

Since I conclude, infra, that the unilateral changes were unlawful acts which tended to prolong it, the strike was converted to an unfair labor practice strike. Therefore, the replacements were not permanent and their wishes concerning being represented by the Union were irrelevant.

In this context, the Respondent unlawfully, and in violation of Section 8(a)(5), withdrew recognition from the Union.

7. The strike

The Union and General Counsel argue that when the strike began on September 11, it was to protest the Respondent's unfair labor practices. However, since I conclude that the Respondent had not in fact bargained in bad faith at that time, I conclude the strike was at its inception an economic strike. That the Union had filed a charge on September 7 and told employees on September 8 that if they struck it would be an unfair labor practice strike, does not make it so. The opinion of the Union's agents is irrelevant. There must have been unfair labor practices which had some causal relation to the strike and I find there were none. At the time of the strike there had been but four negotiation sessions, with each party staking out its adamant position; however, the Respondent had in fact made minor concession at the August 31 meeting. In any event, I conclude that the strike was an attempt to force the economic position taken by the Union and references to it being to protest unfair labor practices was a hope that employees would gain an additional measure of protection.

I further conclude that the strike was not converted to an unfair labor practice strike when Shea sought to deal directly with employees and bypass the Union in an effort to settle the contract dispute. Not every unfair labor practice will convert a strike. In order for a subsequent unfair labor practice to convert a strike there must be shown a causal connection between the "unlawful conduct and prolongation of the strike," and direct dealing such as that here "would not necessarily cause prolongation of the strike." *Forest Grove Lumber Co.,* 275 NLRB 1007 (1985). Although Penniman told fellow employees what Shea had said, there is simply no evidence that the employees continued to strike because of Shea's activity. Cf., *F. L. Thorpe & Co.,* 315 NLRB 147 (1994), where a strike was converted due to the unlawful acts of a high management official repeatedly telling strikers that they were fired and should go home.

However, the unilateral changes, beginning with the Respondent's failure to make pension payments on behalf of newly hired and crossover employees was such an unfair labor practice to cause the strike to be converted. The pension plan is a substantial benefit. Though the Respondent argues that it intended to change the plan for the employees' benefit, and that it had some reservations about potential unfunded liability, the fact of the matter is that the Respondent ceased contributing to any kind of a pension plan. While the subjective evidence is minimal that such caused a prolongation of the strike, or was even known to the strikers, it must have been. Certainly the Union know that contributions were not being made, since the Fund received a report on November 14 showing zero payment

[4] Case 1–CA–33956.

for October. Such a fundlemental altering of employee compensation necessarily would prolong the strike and I find it did. Therefore, I conclude that by this act of the Respondent, the strike was converted to an unfair labor practice strike.

In addition is the Respondent's egregious act of withdrawing recognition, which also was was sufficient to convert the strike from economic to unfair labor practice. Nothing could be more detrimental to employee rights than to lose their capacity to bargain collectively through a representative of their own choosing. By withdrawing recognition, this is precisely what the Respondent did. I conclude that the economic strike was converted to an unfair labor practice strike. *Brooks & Perkins,* 282 NLRB 976 (1987). Standing alone, this act would require finding that only those strikers who were not permanently replaced prior to the Respondent's unlawful withdrawal of recognition are entitled to preferential reinstatement. *Lucky 7 Limousine,* 312 NLRB 770 (1993). However, since the strike was converted by early November (when the Union would first have learned that October payments were not made to the pension plan), and prior to the time most of the replacements were hired, I conclude that all strikers were entitled to reinstatement on request as of December 7.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including offering immediate reinstatement to all strikers who had not been permanently replaced prior to the time the Respondent ceased making payments to the pension fund, and make them whole for any losses they may have suffered in accordance with the formula set forth in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]